2013 WL 5297304 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Paul DYER, Petitioner/Appellant,
v.
SUPERINTENDENT OF INSURANCE, Respondent/Appellee.

No. BCD-12-469.
March 11, 2013.

On Appeal from the Superior Court
(Business and Consumer Docket)

Brief for Appellee Superintendent of Insurance

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***1 Introduction**

Appellant Paul Dyer, an insurance consultant and producer, persuaded an **elderly** client to purchase a $40,000 annuity by promising her it would increase the already favorable return she was getting on her modest savings. Two years later, his client realized that the interest rate the annuity was paying her was negative. During the ensuing investigation, Dyer lied to the Bureau of Insurance in an attempt to pin blame for the problem entirely on the issuer.

The Superintendent of Insurance, after a two-day adjudicatory hearing, revoked Dyer's consultant and producer licenses and ordered him to pay restitution and civil penalties. Dyer now claims that the Superintendent erred in her factual findings, particularly in believing the testimony of the victim over his own conflicting testimony. He also argues that the penalties imposed on him were too harsh.

The Superintendent's detailed, well-supported decision should be affirmed. Nearly all of Dyer's challenges to the Superintendent's findings dispute not the existence of evidence supporting the finding but the Superintendent's decision to believe that evidence. Such credibility determinations are reserved exclusively for the factfinder. Mr. Dyer's attempt to paint the victim's testimony as so "inherently unreliable" as to warrant an exception to this well-established rule is based on misconstruing self-deprecating jokes as admissions and inflating an occasional inability to recall a minor detail into cognitive impairment.

***2** Dyer also fails to show that the penalties imposed upon him were an abuse of discretion. Dyer not only sold an inappropriate annuity to a vulnerable consumer under false pretenses, he also - as the Superior Court observed - breached the fiduciary duty he owed to that consumer as her consultant and then later lied to the Bureau on a point highly material to its investigation. License revocation is well within the Superintendent's statutory authority for such violations, and previous Bureau adjudicatory decisions make clear that revocation has in the past been imposed for violations of similar magnitude.

The Superintendent's decision, as modified on remand, should be affirmed in its entirety.

Statement of Facts

The Victim

Dyer's victim, J.V., was a 72-year-old woman with an eighth-grade education. (App. 211, 254.) In 2004, J.V. was retired and living on a fixed income from various sources, including withdrawals from an annuity she had purchased in 1995 from Modern Woodmen of America, a fraternal life insurance society. (App. 277, 287.) J.V. was in the lowest possible tax bracket and she had not had to file a tax return since 1999. (App. 287, 151; R. 967.) J.V. did, however, have a "medium-sized" estate, most of which was invested in the Modern Woodmen annuity. (App. 83, 96, 108.)

***3** *Dyer's Relationship with the Victim*

J.V. first encountered Dyer in late 2004, after attending a presentation he gave at the Augusta Civic Center on long-term care planning. (App. 82-83, 197.) Dyer was then a licensed insurance producer and consultant with 22 years of experience.[1] (R. 224.) J.V. filled out a questionnaire at the event, which led Dyer to contact her and set up an appointment. (App. 197.)

Dyer and J.V. met several times and discussed long-term care. (App. 84, 198-99.) In January 2005, Dyer persuaded J.V. to hire him as an insurance consultant. (App. 84.) In contrast to producers, who sell insurance and are typically paid commissions by insurance companies, consultants work for the buyer and are therefore subject to more exacting ethical standards. Acting as a consultant, Dyer was required to "serve with objectivity and complete loyalty the interests of the client and to render to the client such information, counsel and service that, within the knowledge, understanding and opinion in good faith of the consultant, best serves the client's insurance or annuity needs and interests." 24-A M.R.S. § 1467.

Dyer had J.V. sign a contract agreeing to pay him a consulting fee of $150 per hour up to a maximum of $1,500. (App. 249.) The contract also allowed Dyer to earn commissions on any annuities he sold to J.V., subject to the requirement that he offset his consulting fees by the amount of any first- ***4** year commissions earned.[2] *(Id.)* The contract thus provided Dyer with a guaranteed minimum fee, plus the chance to earn more in commissions. The contract specified that Dyer was to prepare "a final written report incorporating [Dyer's] advice, counsel or opinion in regards to [J.V.'s] needs," which "will be submitted to the client." *(Id.)*

The Alleged Four-Part Plan

Dyer claimed to have devised a four-part plan to protect J.V.'s estate from potential future long-term care costs. (App. 92-97, 287.) Since J.V.'s poor health made her ineligible for private long-term care insurance, the primary goal of the alleged plan, according to Dyer, was to remove assets from J.V.'s estate in order to make J.V. eligible for Medicaid. (App. 92-93.) The plan also involved emptying J.V.'s Modern Woodmen annuity to fund the purchase of new annuity products. (App. 110, 116.)

As the Superintendent found at hearing, Dyer neither adequately documented nor explained the plan to J.V. (App. 67.) Dyer conceded that he never provided J.V. with the plan in writing, maintaining that it was "impossible" to assemble the plan until after the plan was fully implemented. (App. 139.) J.V. testified that Dyer did not explain the plan orally either. (App. 200, 202.) Asked whether Dyer ever discussed with her gifting money to her ***5** children before death - the key component of any Medicaid impoverishment strategy - J.V. responded, "If he did, you know what my answer would have been? N-O ... I'm hanging onto it until I don't need it anymore." (App. 237.)

The Annuity Purchase

The Modern Woodmen annuity in which J.V. held most of her savings was a single-premium deferred annuity, or SPDA. (App. 280.) This type of annuity is purchased with a single lump-sum payment, after which it earns tax-deferred interest. Once the annuity matures, the annuitant can choose various payout options or simply withdraw money as needed. (*See, e.g.*, App. 263-73.) J.V. purchased her SPDA in 1995 for $123,000. (App. 265.) By 2005, it had a balance of about $144,000 and J.V. was making monthly, non-annuitized withdrawals from it for living expenses. (App. 277.) Because J.V. had held the annuity for more than seven years, these withdrawals were penalty-free. (App. 265.)

The SPDA paid J.V. a generous interest rate: in 2005 the base rate varied between 5.45% and 5.55%, with a 0.25% bonus on amounts over $100,000. (App. 281.) The rate was guaranteed not to drop below 4%. (App. 280.)

Despite what Dyer later described as a "low interest rate environment" (R. 639), Dyer advised J.V. to remove about $40,000 - one-third of the total balance - from the SPDA to purchase a different kind of annuity, called a single-premium immediate annuity, or SPIA. (App. 108-09.) A SPIA, like an SPDA, is funded by a lump-sum payment. The difference is that a SPIA begins ***6** making payments immediately upon purchase (See R. 912.) The SPIA income replaced J.V.'s monthly withdrawals from the SPDA. (App. 277.)

Dyer selected a SPIA that made fixed monthly payments for 60 months. (App. 254.) It was offered by.Fidelity and Guaranty Life Insurance Company (later acquired by the Old Mutual Financial Network and referred to throughout the proceeding as "Old Mutual"). (App. 253.) In choosing the SPIA, Dyer claims that he relied upon a written quote from a wholesale broker that specified an interest rate between 2% and 3%. (App. 105-06.) Dyer could not, however, produce a copy of the quote and an Old Mutual witness testified that, as far as he could tell, neither Dyer nor his broker ever obtained a quote from Old Mutual. (App. 290; R. 387; see R. 729.)

Dyer claimed that he warned J.V. that the interest rete on the SPIA would be between 2% and 3%. (App. 117.) But J.V. testified that Dyer never gave her such warning. (App. 236-37.) In fact, J.V. testified that she was "certain" that Dyer promised her

6%-7% interest on the new annuity. (App. 225.) J.V. further testified that, in agreeing to the transaction, the prospect of a higher interest rate was her principal concern. (App. 206.)

Dyer prepared the application for the SPIA but did not review it with J.V. (App. 118-19.) Instead, he mailed it to her with "sign here" stickers. (Id.) J.V. testified that Dyer never confirmed with her that she fully understood the transaction. (App. 202-03.) At the time, J.V. did not even understand what a SPIA was. (App. 201, 234.) J.V. also testified that Dyer did not tell her that a 2% premium tax would be imposed, reducing the SPIA's yield commensurately. ***7** (App. 201; R. 743.) Nor did Dyer tell her that Old Mutual would pay him a commission of $1,376, further reducing the SPIA's yield. (App. 201; R. 745.) Trusting that Dyer was looking out for her interests (App. 203), as his fiduciary duty requires, J.V. signed the application on May 31, 2005. (App. 252.)

As the resulting contract issued on June 20, 2005 plainly shows, the SPIA's interest rate was not 6% to 7%, or even 2% to 3% - it was negative. (App. 254.) J.V. paid $39,326.50 for the SPIA. (Id.) In exchange, Old Mutual was to pay J.V. a fixed sum of $648.23 per month for five years. (Id.) Thus, the SPIA was to pay out to J.V. a total of $38,893.80 ($648.23 x 60). That total payout was $432.70 less than J.V. had paid for the product. In contrast, had J.V. allowed the $39,326.50 to earn interest in the SPDA over that time period, she would have been guaranteed a minimum return of $6,679.94, and the actual return would have been higher because the SPDA was paying well above the guaranteed rate. (R. 513-14; App. 281.)

Making matters worse, the transfer also affected the interest rate on J.V.'s Modern Woodmen SPDA. Because of the transfer, J.V.'s SPDA's balance fell from $143,819 to $104,960. (App. 277.) This reduction virtually eliminated for J.V. the 0.25% bonus interest rate Modern Woodmen paid on the portion of the balance in excess of $100,000. (See App. 281.)

Dyer's Response to the Problem

Upon issuing an annuity, Old Mutual sends a copy of the issued contract to the producer for review during a 20-day cancellation period. (R. 740.) Dyer, however, never realized that the yield on the SPIA was negative. According to ***8** Dyer, "I relied on the insurance company doing the math before they sent the [SPIA contract], so I did not check the calculation." (App. 119.) It was J.V. who eventually did the calculation and realized that the SPIA was not paying the benefits Dyer promised her. (App. 207.)

Once J.V. alerted him to the SPIA's negative yield, Dyer contacted Old Mutual seeking to retroactively adjust the contract. In an angry email to Old Mutual, Dyer claimed the company had made "promises... on an answer machine tape that are now being verbally rescinded." (R. 718.) Dyer also described the alleged telephone message in his correspondence with the Bureau during the investigation." (App. 124.)

In fact, the evidence at hearing indicated that no such message ever existed. Dyer could not produce the message, claiming that he **neglected** to save it. (Id.) Russell Laws, Old Mutual's Vice-President of Client Services and Claims, testified that Old Mutual conducted a search of its outgoing call records - which it scrupulously maintains (App. 180, 182-83) - and "could find no evidence that a call took place." (R. 424.) Further, although Dyer claimed he played the message for J.V. over the telephone, she testified that she did not recall Dyer ever playing for her any message promising a refund and asserted "I would remember that if they had said it." (App. 233.)

Dyer eventually filed, on J.V.'s behalf, a complaint with the Bureau of Insurance against Old Mutual. (R. 638-39.) Based on Dyer's complaint, the Bureau opened an investigation and made inquiries to Old Mutual regarding the SPIA. (App. 282.) Old Mutual, in turn, asked its agent Dyer to explain the ***9** rationale for the transaction. *(Id.)* Dyer provided Old Mutual with a "dump of his documents" but refused to answer its questions. (R. 377; App. 162.) Old Mutual then terminated Dye's authority to sell its products, concluding that Dyer, in addition to breaching his contract by refusing to adequately respond to its inquiries, sold J.V. an unsuitable replacement for her SPDA and misrepresented to J.V. the value of the SPIA. (App. 162-63.)

Upon investigation, Old Mutual determined that the SPIA's yield was not a calculation error. Rather, the yield was negative for a specific, predictable reason: the very short payout period and the modest amount invested prevented the principal from earning enough interest to offset Dyer's sales commission and Maine's 2% premium tax. (App. 160-161; R. 731, 739-40.) In other words, the SPIA transaction had hidden costs - which Dyer failed to disclose to J.V. (App. 201) - that five years of interest on dwindling principa could not cancel out.

Although the SPIA contract did not obligate it to do so, Old Mutual agreed to raise J.V.'s monthly payment to $662.65 per month (R. 883); just enough so J.V. would break even in nominal dollars.[3] At hearing, Mr. Laws explained that, although the monthly payments had been accurately calculated under the applicable formula, Old Mutual decided to raise the payments because "insurance products accrue some benefit to their purchasers, and this product should have just like any other product." (R. 371-72.)

***10** *The Purported Rationales for the Transaction*

Although Dyer professed to be unaware that the SPIA's yield was negative, he knew it would be very low. Indeed, at hearing, Dyer was dismissive of the significance of the SPIA's yield, asserting that "a SPIA isn't about yield" and that, because the alleged plan involved gifting money to J.V.'s heirs, "we weren't arguing over the pennies at that point." (App. 116-17.)

Dyer specifically offered three rationales for moving J.V.'s money from a high-yielding annuity to a low-yielding one:

Helping J.V. to Become Eligible for Medicaid. J.V. testified that she would have had no interest in a plan that involved giving away her assets to qualify for Medicaid. (App. 237.) But even if she had endorsed this idea, the only way the SPIA purchased by Dyer helped J.V. become eligible for Medicaid was by wasting her money. Dyer did not apply for a "Senior Safeguard" annuity, Old Mutual's Medicaid planning product. (App. 250, 164-66; R. 912.) Laws, the Old Mutual executive, testified that the SPIA for which Dyer did apply was inappropriate for Medicaid planning absent "modifications to the contract, including endorsements." (App. 165-66.) Dyer also designated J.V.'s own estate as the SPIA's beneficiary in the event of J.V.'s death (App. 260), which is contrary to a strategy of removing assets from the estate.

Reducing Taxable Income. Dyer asserted that the SPIA also provided J.V. with tax benefits by allowing her to reduce the proportion of her income that was taxable. (App. 96.) But J.V. was already in a "zero tax bracket" (App. 288); reduced taxable income in a typical tax year could not have benefited her.

***11** Indeed, over the six calendar years that the SPIA made payments to J.V., there was only one, 2005, in which even Dyer contended the SPIA would provide any tax benefits. (App. 95.) In that year, J.V. planned to liquidate a tax-deferred retirement account, which Dyer claimed would raise J.V.'s income to taxable levels. (App. 96, 228.) Dyer claimed that replacing some of J.V.'s taxable income with the partially tax-exempt SPIA income would offset enough of the realization from the retirement account to keep J.V.'s income in 2005 below taxable levels. (App. 96.)

The record shows that, if there were any savings at all from this strategy, they must have been exceedingly small. First, the SPIA did not fully replace taxable income with tax-exempt income: the SPIA had an "exclusion ratio" of 65%, which meant that 35% of each SPIA payment remained taxable. (App. 107-08; R. 655.) Second, the SPIA was not purchased until midway through 2005, meaning that J.V. received only six tax-favored payments in the tax year in which she allegedly needed them. (R. 655.) Of the roughly $25,000 in tax-exempt income paid out by the SPIA over six calendar years, only $2,509 ($648 x 6 x 65%) would have been paid out in 2005.

In short, Dyer advised J.V. to irrevocably give up the ability to earn nearly 6% per annum on almost $40,000 in order to reduce her taxable income (not her taxes) in a single tax year by, at most, $2,500. Notably, even Dyer did not suggest that this small reduction in taxable income, by itself, would make up for the lost interest from the Modern Woodmen SPDA. (App. 117.)

***12** *Diversification.* Dyer claimed that he felt that J.V. needed to diversify her annuity holdings in case Modern Woodmen were to fail. But, according to J.V., he never expressed this concern. (App. 236.) Moreover, his actions at the time belie any such concern. Dyer first tried to purchase the SPIA from none other than Modern Woodmen itself. (App. 105-06.)

The Bureau Proceedings

On December 16, 2009, the Bureau filed a petition for enforcement against Dyer alleging multiple violations of the Insurance Code based on his sale of the Old Mutual SPIA to J.V. and subsequent conduct. (App. 36-49.) At the time, Dyer was already serving a three-year license suspension as a result of unrelated Insurance Code violations that occurred largely after the ones at issue here. (R. 557.) [4]

An adjudicatory hearing before then-Superintendent Kofman was held on December 2 and 3, 2010. Bureau Staff called Dyer, J.V., Laws, and a Bureau investigator to testify in support of its allegations. Dyer called his former attorney and himself. Dyer also sought to call a purported polygraph expert, who was excluded upon Bureau Staff's objection. (R. 599, 605.)

On March 7, 2011, the Superintendent issued her Decision and Order, which included the following findings of fact:

● Dyer's alleged plan for J.V.'s estate was not adequately documented or explained to J.V. (App. 67);

***13** ● Dyer's professed justifications for using money from J.V.'s high-yield Modern Woodmen SPDA to purchase the SPIA were “either grossly incompetent or fraudulent” (App. 68);

● Dyer failed to give J.V. the warnings that he said he gave her about the low yield of the SPIA and, to the contrary, told J.V. that the yield would be 6% to 7% (App. 68-69);

● Dyer's emails to Old Mutual, in which he referred to an alleged voicemail message promising a refund to J.V., “were part of a pattern of deception designed to persuade Old Mutual to compensate J.V. so that Dyer would not be responsible for her losses.” (App. 70.)

The 10-page single-spaced Decision provided extensive record support for each finding of fact. To the extent that these conclusions were not based on undisputed evidence, they were based on the Superintendent's crediting of the testimony of J.V. and other evidence over the conflicting testimony of Dyer.

Based on the facts found, the Decision concluded that Dyer committed 11 specific acts that violated the Insurance Code:

1. breaching his consultant agreement with J.V. by failing to make a proper evaluation of her plans and needs;

2. selling J.V. an annuity that caused her unnecessary loss;

3. representing to J.V. that she would receive 6%-7% interest on the Old Mutual annuity;

4. selling J.V. an annuity product without having reasonable grounds to believe it was suitable for her and without conducting an adequate investigation to determine its suitability;

5. failing to provide an adequate explanation of the Old Mutual annuity;

6. failing to obtain assurance from J.V. that she understood the Old Mutual annuity;

7. failing to make sure that the Old Mutual annuity was properly issued and would provide appropriate earnings;

***14** 8. failing to keep adequate records of his alleged four-part plan;

9. failing to cooperate with Old Mutual in its response to a regulatory investigation;

10. falsely representing to Old Mutual that it had left him an answering machine message promising J.V. a refund; and

11. falsely representing to the Bureau of Insurance that Old Mutual had left him the same answering machine message.

(App. 73.) The Superintendent further found that each of these 11 acts violated "one or more" provisions of the Insurance Code, and listed, for each act, the statutes violated. (Id.) Collectively, she found the 11 acts to have violated six provisions of the Insurance Code a total of 30 times. Each act was found to violate between two and five different statutes. (Id.)

In determining the appropriate penalty for Dyer, the Superintendent based her assessment on the "wrongful acts" Dyer committed, not the number of statutes those acts violated. (App. 72.) The Superintendent imposed a penalty of $5,500 - $500 for each act, regardless of which statutes the act violated. [5] (App. 73.) The Superintendent further revoked Dyer's producer and consultant licenses and ordered that he return his commission to J.V. as restitution. (App. 73-74.)

The Rule 80C Appeal and Subsequent Remand

Dyer appealed the Superintendent's decision to the Superior Court, claiming the Superintendent misapplied certain provisions of the Insurance ***15** Code, improperly excluded evidence, and was biased against Dyer. Dyer also briefly argued that a handful of the Superintendent's findings - all relating to adequacy and accuracy of Dyer's pre-transaction communications with J.V. - were not supported by substantial evidence.

The Superior Court (Horton, J.), rejected nearly all of Dyer's arguments. Most notably, the court ruled that all of the challenged findings were supported by substantial evidence, namely J.V.'s testimony. (App. 15.) The court also rejected Dyer's evidentiary and bias arguments. (App. 19-21.)

The court nevertheless remanded the matter for two reasons. First, it agreed with a footnote in Dyer's brief arguing that the Insurance Code's record-keeping requirement, 24-A M.R.S. § 1447(2), did not technically apply to future plans. (App. 16-17.) The court affirmed, however, that Dyer's failure to keep records of his plan demonstrated untrustworthiness and incompetence in violation of 24-A M.R.S. § 1420-K(1)(H). (App. 17 n.2.)

Second, the court found that the decision did not adequately explain the eight violations of the Insurance Code's general prohibition on "unfair or deceptive" trade practices, 24-A M.R.S. § 2152. (App. 17-18.)

As a result of these two determinations, the court remanded the decision with instructions to explain the factual and legal bases for the violations of 24-A M.R.S. § 2152 and reconsider the appropriate penalties for Dyer. (App. 22.) The court directed that the penalties may not be "more onerous" than the original penalties, but did not require the Superintendent to reduce them. (Id.)

***16** *The Remand Decision and Second Rule 80C Appeal*

On remand, the appointed hearing officer (Superintendent Kofman had by then left the Bureau) addressed the Superior Court's concerns about the § 2152 violations by withdrawing them. (App. 78.) The hearing officer explained that:

the penalties and restitution that are warranted depend on the nature, extent, and variety of the wrongful acts, their cumulative impact on the victim, and the consistency and duration of the pattern of misconduct, not on the number of different provisions of the Insurance Code that could be cited as prohibiting each of the wrongful acts in question.

(Id.) The hearing officer concluded that the "cumulative impact of the acts in question continues to demonstrate Dyer's unfitness to act as an insurance professional." (App. 79.) The hearing officer further concluded that no reduction in civil penalties was appropriate for the nine wrongful acts affected by the remand in light of the "incompetence and untrustworthiness" Dyer demonstrated in committing those acts. (App. 78.) The hearing officer thus reinstated the penalties from the Superintendent's original decision. (App. 79.)

Dyer again appealed. The court, while disagreeing with some of the agency's legal reasoning, affirmed the re-imposed penalties as within the agency's discretion. (App. 34.) The court singled out Dyer' breach of his fiduciary duty to J.V. and his lying to the Bureau of Insurance as particularly troubling. (App. 33-34.) This appeal followed.

***17 Statement of Issues for Review**

1. Whether Dyer preserved his challenges to the Superintendent's factual findings despite failing to raise most of them in the lower court.

II. Whether Dyer has met his burden of showing that no competent record evidence supported the Superintendent's findings regarding Dyer's pre-transaction communications with J.V.

III. Whether the sanctions imposed on Dyer on remand were arbitrary, capricious, or an abuse of discretion.

Summary of Argument

Standards of Appellate Review

In an appeal of an agency action pursuant to M.R. Civ. P. 80C, this Court reviews the agency decision "directly for an abuse of discretion, error of law, or findings not supported by the evidence." *Bankers Life and Cas. Co. v. Superintendent of Ins.*, 2013 ME 7, ¶ 15, ___A.3d ___ (quoting *Anthem Health Plans of Me., Inc. v. Superintendent of Ins.*, 2012 ME 21,¶13, 40 A.2d 380). Such review is "deferential and limited." *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, 12, 989 A.2d 1128. "[T]he burden of proof clearly rests with the party seeking to overturn the decision of an administrative agency." *Seven Islands Land Co. v. Me. Land Use Regulation Comm'n*, 450 A.2d 475, 479-80 (Me. 1982).

Findings of fact are entitled to "substantial deference" by the reviewing Court. *York Hosp. v. Dep't of Health & Human Servs.*, 2008 ME 165, ¶ 16, 959 A.2d 67. Findings should be affirmed if "the agency's decision is supported by ***18** substantial evidence on the whole record." *Dodd v. Sec. of State*, 526 A.2d 583, 584 (Me. 1987). This standard "does not involve any weighing of the merits of evidence" by the reviewing court; an agency decision may be vacated "only if there is no competent evidence in the record to support a decision." *Friends of Lincoln Lakes*, 2010 ME 18, 1 14, 989 A.2d 1128. Conversely, if competent evidence supports the agency's findings, they should be affirmed "even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Id.* at ¶ 13. "Any court review that would redecide the weight and significance given the evidence by the administrative agency would lead to ad hoc judicial decision-making, without giving due regard to the agency's expertise." *Id.* at ¶ 14.

Judicial review of agency findings does not extend to credibility determinations, which are "exclusively the province of the [agency]." *Sprague Elec. Co. v. Me. Unemployment Ins. Comm'n*, 544 A.2d 728, 732 (Me. 1988).

When a dispute involves an agency's interpretation of a statute administered by it, "the agency's interpretation, although not binding on the Court, is accorded great deference and will be upheld unless the statute plainly compels a contrary result." Me. Bankers Ass'n v. Bureau of Banking, 684 A.2d 1304, 1306 (Me. 1996).

Penalties imposed by an agency are reviewed for "abuse of discretion, errors of law, or findings not supported by the evidence." *Waxier v. Me. Real Estate Comm'n*, 1998 ME 65, ¶ 4, 708 A.2d 663. An abuse of discretion is an "unreasonable, unconscionable and arbitrary action taken without proper ***19** consideration of facts and law pertaining to [the] matter submitted." *Greely v. Comm'r, Dep't of Human Servs.*, 2000 ME 56, ¶ 8, 748 A.2d 472 (quoting Black's Law Dictionary 11 (6th ed. 1990)). The reviewing court should not "attempt to second-guess the agency on matters failing within its realm of expertise." *Wood v. Superintendent of Ins.*, 638 A.2d 67, 71 (Me. 1994).

Summary of the Argument

I. The Superintendent's Factual Findings Should Be Affirmed

Dyer failed to raise most of his challenges to the Superintendent's factual findings in the lower court, thus failing to preserve them for appellate review.

To the extent that he preserved his challenges to the findings, Dyer does not meet the heavy burden required to undo them. Nearly all of Dyer's challenges dispute only the credibility of the evidence against him, not whether evidence exists. But such credibility determinations are "exclusively" for the factfinder. *Sprague Elec. Co.*, 544 A.2d at 732.

Even if credibility determinations could be challenged, the Superintendent did not in err by crediting J.V.'s testimony. Dyer's argument to the contrary is based on compiling out-of-context snippets of transcript that do not fairly reflect the witness's overall testimony. Moreover, the Superintendent expressly considered whether J.V.'s memory issues discredited her unequivocal testimony on the main issues in the case, and concluded they did not.

Dyer's challenges to specific findings fare no better. Dyer's claim that he fully and accurately explained the transaction to J.V. is contradicted by J.V.'s directly contrary testimony - in particular her testimony that she was "certain" ***20** Dyer promised her a high interest rate on the SPIA. (App. 225.) Dyer's claim that the annuity was a good deal for J.V., in addition to being facially implausible, ignores unequivocal testimony from Old Mutual that the annuity selected by Dyer did not actually do what Dyer now claims it was intended to do: help J.V. qualify for Medicaid. (App. 165-66, 181.) His claim that he did not lie about the alleged voicemail message is contradicted by testimony from both Old Mutual and J.V. (App. 180, 233; R. 424), as well as Dyer's own inability to produce the message or any record of it. And his claim that he cooperated with Old Mutual in responding to the investigation is contradicted by the undisputed fact that he refused to explain to Old Mutual - in breach of his producer's agreement - the rationale for the transaction. (R. 377-79.) II. The Penalties Imposed on Dyer Were Not an Abuse of Discretion

As the lower court affirmed, revocation of Dyer's licenses was not an abuse of the Superintendent's discretion to decide the appropriate sanctions for his conduct. Dyer's conduct was not merely "sloppy and/or careless" (Blue Br. 40), but included intentional misrepresentations, gross incompetence, and a breach of his fiduciary duty to his client. Dyer's attempt to show that the penalties imposed were out of step with other Bureau decisions, in addition to being foreclosed by Hall v. Board of Environmental Protection, 498 A.2d 260 (Me. 1985), minimizes the reprehensibility of his conduct and improperly compares penalties imposed in negotiated consent agreements to a penalty that was imposed after an adjudicatory hearing.

***21** That the hearing officer on remand withdrew eight violations of 24-A M.R.S. § 2152 as duplicative and unnecessary does not materially alter the assessment of Dyer's culpability. The Superintendent evaluated Dyer's culpability on the basis of the 11 wrongful acts he was found to have committed, not on how many Insurance Code provisions those acts could be said to have violated. By the time of the remand, there was no dispute that (a) Dyer had committed these 11 acts, (b) they were all illegal,

and (c) they all demonstrated Dyer's "incompetence and untrustworthiness." Whether Dyer did or did not violate § 2152, which requires neither malice nor deceptive intent, adds little to the analysis.

Dyer's argument that the "whole record" does not support the penalties merely reprises his other arguments. The only new contention, that the Superintendent improperly excluded a polygraph expert and a late-filed affidavit, is irrelevant to the appropriateness of the penalties.

Argument

I THE SUPERINTENDENT'S FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE

Dyer first argues that the Superintendent lacked an evidentiary basis in the record for the "vast majority" of her findings. (Blue Br. 19.) Most of these contentions were not raised below and are therefore waived. In any event, every fact found by the Superintendent was supported by competent record evidence.

***22 A. Dyer Failed to Preserve Most of His Attacks on the Superintendent's Findings by Not Raising them in the Lower Court**

In his original Rule 80C appeal to the Superior Court, Dyer singled out three of the Superintendent's factual findings that he contended were not supported by substantial evidence: (a) that J.V. did not understand what a SPIA or what a partial 1035 exchange was; (b) that Dyer did not warn J.V. that the SPIA would generate a lower yield, and (c) that Dyer did not advise J.V. of the advantages of gifting assets prior to her death. (App. 15; Pet. Rule 80C Br., dated July 5, 2011, at 11-13.) Dyer has now expanded his attack to include the "vast majority" of the Superintendent's findings. (Blue Br. 19.) Among the findings that Dyer now claims lack substantial evidence:

- that he failed to ensure the SPIA was properly issued (Blue Br. 28);
- that the SPIA was not appropriate for J.V. (Blue Br. 28-32);
- that he lied to the Bureau of Insurance and Old Mutual (Blue Br. 32-34);
- that he failed to cooperate with Old Mutual in responding to a regulatory investigation (Blue Br. 35-36). [6]

In addition, Dyer argues here for the first time that the Superintendent improperly implied that Dyer committed fraud (Blue Br. 34-35), that the Superintendent erred in concluding that Dyer's failure to cooperate with Old Mutual violated the Insurance Code (Blue Br. 36-37), and that the "whole ***23** record" does not support the penalties imposed (Blue Br. 45-48). Dyer has also expanded his attack on J.V.'s credibility, arguing for the first time that her entire testimony was "inherently unreliable." (Blue Br. 22.)

Dyer failed to preserve these arguments by not raising them in the lower court. *See Carrier v. Sec. of State*, 2012 ME 142, ¶ 19, ___.3d.__;New England *Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife*, 550 A.2d 56, 59 (Me. 1988). Indeed, with regard to the finding that the SPIA was inappropriate for J.V., the Superior Court expressly found after remand that Dyer had failed to preserve any challenge to it. (App. 34.) The only arguments in Part I of Dyer's brief that were preserved are those made in Parts I.A and I.B (Blue Br. 22-28) to the extent they concern Dyer's pre-transaction communications with J.V.

B. J.V. Was A Competent Witness Upon Whose Testimony the Superintendent Could Properly Rely

Dyer never challenged J.V.'s competence to testify during the course of the proceeding. Nevertheless, he now asserts that it was legal error for the Superintendent to credit anything J.V. said. This argument, to the extent not waived, is outside the limited scope of a Rule 80C review. In appeals of agency adjudications, credibility determinations are "exclusively the province of the [agency] and will not be disturbed on appeal." *Sprague Elec. Co.*, 544 A.2d at 732.[7] Notably, Dyer cannot point to a single case in which this Court has ***24** disturbed a factfinder's determination of witness credibility, let alone ruled that everything a witness said was inherently incredible.

The rule that credibility determinations are for the factfinder recognizes that "it is the factfinder who is in the best position to evaluate the credibility of witnesses." *W.S. Libbey Co. v. Me. Employment Sec. Comm'n*, 446 A.2d 42, 44 (Me. 1982). Even if, as the lower court opined, a reviewing court could theoretically overturn an agency factfinder's credibility determination where the testimony "is so farfetched as to compel its disbelief (App. 14 (quoting *W.S. Libbey Co.*, 446 A.2d at 44)), such a threshold would in practice be virtually impossible to overcome. Unlike the factfinder, who can carefully observe a testifying witness of questionable credibility, a reviewing court has nothing to go on but a cold transcript. Transcripts rarely reveal whether a witness is nervous or relaxed, confident or tentative, self-deprecating or serious. Even less does a cold transcript allow for the quasi-medical assessment of a witness's cognitive abilities sought by Dyer here.

In any event, the transcript does not support Dyer's argument. When read as a whole - rather than in cherry-picked, out-of-context snippets - the transcript reveals an unpolished but alert and engaged witness with a self-deprecating sense of humor (particularly regarding her age) and strong, ***25** consistent views about her finances and estate. While it is true that J.V. sometimes indicated that her memory was fuzzy, the Superintendent did not ignore those occasional memory issues. Rather, the Superintendent expressly considered J.V.'s memory lapses in assessing her credibility, but ultimately found J.V.'s testimony "on the most important points was clear and consistent." (App. 69.) The Superintendent also found it significant that when J.V. could not remember something, she "readily acknowledged" it and that much of her testimony was "corroborated by the written evidence and the credible portions of Dyer's own testimony." (Id.)

Dyer's own brief reinforces the Superintendent's point. Although Dyer points to passages in which J.V. jokes about her memory or acknowledges a possible memory lapse, he cites no instance in which J.V. seems confused or forgetful on any point crucial to the Superintendent's findings.

J.V.'s testimony on the promised interest rate, for example, was highly detailed. After confirming that she was "certain" that Dyer promised her a 6% to 7% rate, J.V. recalled that Dyer's assistant was sitting in J.V.'s recliner when he made that promise to her. (App. 225.) In other testimony she gave additional details about the meeting. (App. 198-99, 218.) J.V. also made it clear that the yield on her money was extremely important to her (App. 199, 206), making her particularly likely to remember such promises by Dyer. Indeed, J.V. demonstrated just how sharp her memory was on such issues by correctly recalling the amounts of both her original SPIA payment and her adjusted payment to the penny. (R. 503.)

***26** The remaining memory issues cited by Dyer are trivial. It is hardly shocking, for example, that J.V. would agree that "there are conversations you had five or six years ago that you would not remember today, right?" (App. 238.) What witness could truthfully answer otherwise? It is equally unremarkable that J.V., after recalling the name of the Modern Woodmen agent she worked with, could not also name the agent's predecessor, for whom she "initially did paperwork."[8] (App. 216, 198.) J.V.'s confusing two men present at the hearing whom she did not know and had never before seen says little about her mental prowess, especially where there is no evidence as to the quality of her eyesight or how far away she was sitting. And if referring to Medicare as "Medicaid" is evidence of incompetence, a sizeable percentage of Americans would be barred from the witness stand.[9]

Dyer also finds it significant that J.V. did not recognize a handful of documents shown or described to her. (Blue Br. 23.) But the record alone in this case contains nearly 50 exhibits relating to the transaction; no witness ***27** could be expected to remember them all. Expecting J.V. to have a perfect memory of this paperwork is even more unreasonable since, by her own admission, she "didn't know anything about this sort of stuff and relied heavily upon Dyer to protect her interests. (App. 222, 224.) Dyer

also fails to mention that two of the four documents J.V. did not recall, although bearing J.V.'s signature, were actually drafted by Dyer. (App. 211, 231.) And while she did not recognize a specific letter to her from a Bureau investigator, she did generally recall corresponding with that investigator. (App. 222.)

Finally, Dyer finds it "telling[]" that J.V. testified that she had no intention of giving a retirement account to her granddaugther. (Blue Br. 24.) But this was, at worst, a momentary lapse. Moments later, J.V. recalled the gift and explained that it was to provide emergency financial support to her granddaughter during a medical crisis. (App. 228.)

C. Competent Evidence Supported the Superintendent's Findings Regarding Dyer's Failure to Properly Explain His Plans to J.V.

Dyer next argues that, if the Court declines to rule that the entirety of J.V.'s testimony was not credible, it should rule more specifically that the Superintendent erred by crediting J.V.'s account of what Dyer told her about his four-part plan and the SPIA transaction. (Blue Br. 26-28.) This challenge to J.V.'s credibility is no more within the scope of a Rule 80C review than the previous one. Indeed, some of Dyer's arguments are little more than cross-references to his argument on J.V.'s general credibility. (See id.)

***28** As for his remaining contentions, Dyer is correct that J.V. and Dyer met more than once and that they talked generally about long-term care planning. (Blue Br. 26.) But those undisputed facts do not establish whether Dyer sufficiently and accurately explained his plans to J.V. To answer that question, the Superintendent was faced with a classic "he-said, she-said" dispute: Dyer testified he fully explained everything; J.V. testified that Dyer failed to give her even the most rudimentary explanation of how the plan or the transaction worked and, further, misrepresented to her the SPIA's interest rate. Since Dyer never gave the plan to J.V. in writing, the only way for the factfinder to decide this case was by deciding which witness was more credible. As the wer court concluded, "the Superintendent's apparent discrediting of Dyer's testimony in favor of [J.V.]'s testimony is not error." (App. 15.)

It is not true, as Dyer contends (Blue Br. 26-27), that J.V.'s testimony was largely that she did not recall Dyer giving her explanations. In addition to confirming that she was "certain" that Dyer promised her a 6% to 7% interest rate on the SPIA (App. 225), J.V. answered each of the following questions with an unequivocal "no":
Q. Did he talk to you about estate planning? (App. 200)

Q. Did he talk to you about tax planning? (Id.)

Q. And did he ever explain to you what a 1035 exchange was? (Id.)

Q. Did he tell you what his commission would be? (App. 201)

Q. Did you understand at that time what a single premium immediate annuit was? (Id.)

Q. [D]o you know what a fraternal insurer is? (Id.)

***29** Q. Did Dyer ever give you a document outlining a four-part plan that he was creating for you? (App. 202)

Q. Did he ever discuss with you a four-part plan? (Id.)

Q. Did Dyer ever ask you if you understood completely the [SPIA] contract? (Id.)

Q. Did he ever give you a buyer's guide for the insurance product, a guide that told you about the [SPIA], a written document? (App. 203)

Q. Did Dyer mail you any documents before he showed up to have you sign the [SPIA] contract? (App. 206)

Q. Did he ever warn you that he didn't think Modern Woodmen was a safe place to have your money? (App. 236)

Adding to the credibility of these unequivocal denials, J.V. recalled that, with regard to the 1035 exchange and the SPIA, she learned what they were after the fact. (App. 201, 234). Similarly, in denying that Dyer supplied her with paperwork, J.V. noted that "I keep all my paperwork. None of it ever gets thrown away, and there's nothing in my files from [Dyer]." (App. 202.)

Dyer points to a particular answer by J.V. as suggesting that she lacked memory of what Dyer told her. (Blue Br. 27.) But the passage he cites is actually quite incriminating:
Q. Did Dyer ever discuss with you the advantages and disadvantages of giving a lot of money to your kids before you die or leaving it to them after you die?

A. If he did, you know what my answer would have been? N-O... I'm hanging onto it until I don't need it anymore.

(App. 237.) Dyer notes that J.V. started her answer with "If he did..." which he argues is an admission that J.V. did not remember whether Dyer addressed these issues. The passage could also be read as J.V. supplying evidence for an ***30** unspoken "no" by pointing out that she never would have agreed to such a plan had it been presented to her. But it does not matter. The importance of this testimony is that it makes clear that J.V. would have had no interest in a strategy requiring her to gift money to her children while she was still living. [10] If J.V.'s statement is credited, Dyer could not have had J.V.'s informed consent to pursue a Medicaid impoverishment strategy.

In short, J.V.'s clear and unequivocal testimony that Dyer did not adequately explain fundamental aspects of the transaction and, further, assured her it would generate a high return, are, standing alone, competent evidence that Dyer failed to properly communicate with J.V. J.V.'s certainty that she would not have agreed to impoverish herself as part of an estate plan, the lack of any written disclosures to J.V., and the failure of Dyer to review the SPIA application with J.V. corroborate this failure.

D. Dyer's Remaining Challenges to the Superintendent's Findings, If Preserved at All, Are Without Merit

Dyer failed to preserve the remainder of his contentions regarding the Superintendent's findings by not raising them below. (See Part I.A, supra.) In any event, all of these findings are well supported by the record evidence.

31** ***1. Competent Evidence Supported the Superintendent's Finding that Dyer Failed to Ensure that the SPIA Was Properly Issued

Even if Dyer had preserved his challenge to the Superintendent's finding that he failed to ensure the SPIA was properly issued, the finding is supported by overwhelming evidence. The second page of the issued contract - which Old Mutual would have sent to Dyer for review at the start of the 20-day return period (R. 422) - states the amount of the premium and the amount of the monthly payment. (App. 254.) Simply multiplying the monthly payment by 60 months - as J.V. herself eventually did (App. 207) - would have been sufficient to reveal the problem.

Dyer argues that Old Mutual is solely to blame for the SPIA's negative yield. (Blue Br. 28.) But Dyer, unlike Old Mutual, had a fiduciary duty to J.V., 24-A M.R.S. § 1467, and should have confirmed that the product he sold her was what he promised her it was. This is particularly so where the negative yield was not a fluke error but the predictable result of Old Mutual offsetting the SPIA's raw yield with Dyer's commission and state taxes. Moreover, the discrepancy was not, as Dyer claims, a "non-obvious"

$15 a month. (Blue Br. 28.) That was merely the amount by which Old Mutual raised J.V.'s payments so she would break even. Even Dyer admits to promising J.V. a positive return on the SPIA. [11] (App. 117.)

32** ***2. Competent Evidence Supported the Superintendent's Finding that the SPIA Was Inappropriate for J.V.

Dyer next argues that the SPIA - despite causing J.V. to swap a nearly 6% interest rate for a negative interest rate on nearly $40,000 of her modest savings - was actually a good deal for J.V., and that the Superintendent erred in concluding otherwise. (Blue Br. 28-32.)

The Superior Court directly held that Dyer failed to preserve this argument, observing that, by failing to challenge the Superintendent's conclusion that he breached his fiduciary duty to J.V., Dyer "relinquish[ed] any argument that the transaction was in the client's interest." (App. 34; see also Part I.A, supra.) Even if preserved, however, the record evidence does not support Dyer's argument. First, and most importantly, the interest rate on the issued SPIA was negative. Russell Laws from Old Mutual repeatedly described negative-yield products as categorically inappropriate, and further described the company's nationwide efforts to adjust any such annuities that had been issued. (App. 163, 167, 184-88; R. 372.) There is no dispute that Dyer could have easily determined that the SPIA's yield was negative before the 20-day return period had expired. And, while Old Mutual may have issued J.V. an inappropriate product, it was Dyer who sold it to her.

Even ignoring the initial negative yield, Dyer's justifications for the transaction do not hold together. Dyer's primary justification for the SPIA is that it was intended to help make J.V. eligible for Medicaid by removing assets from her estate. (Blue Br. 30.) But Dyer chose the wrong vehicle to accomplish this purpose. It is undisputed that Dyer failed to apply, for Old ***33** Mutual's "Senior Safeguard" SPIA, which is specially designed to comply with Medicaid eligibility rules. (App. 250.) Under cross examination, Old Mutual executive Russell Laws was adamant that a non-Senior Safeguard SPIA could not be used for Medicaid planning absent "modifications to the contract, including endorsements." (App. 165; see also App. 181 ("you can't use this product to shelter your assets from Medicaid spend-downs").) J.V.'s contract did not contain these modifications. (R. 421.)

The Superintendent's conclusion that the SPIA was inappropriate for Medicaid planning is therefore not, as Dyer contends, some unsupported assertion of her "expertise or authority" (Blue Br. 32); rather, it is supported by competent record evidence.

The other alleged purpose of the SPIA was to provide tax benefits to J.V. Dyer complains that the Superintendent failed to cite evidence that "the tax benefits provided by the SPIA would not make up for the loss in income due to the lower yield." (Blue Br. 31-32.) But Dyer himself acknowledged as much. According to Dyer, making up that lost income would require not just the alleged tax benefits, but also an "increase in her income on the other components [of the alleged plan], and then reinvesting in whatever else it was that we chose." [12] (App. 117.) In other words, even Dyer did not contend that ***34** the tax benefits alone justified the transaction; Medicaid planning was the transaction's raison *d'etre*.

Some simple arithmetic confirms Dyer's admission. Dyer concedes that the opportunity for tax savings was limited to tax-year 2005, when J.V. had a one-time boost to her income. (Blue Br. 31.) But J.V. did not begin receiving payments from the SPIA until July 2005, meaning she received only six payments in 2005. (R. 655.) Only 65% of each $648 payment was tax exempt. (Id.) The maximum possible reduction in taxable income that could be attributed to the SPIA (assuming that an equivalent amount of fully taxable income was "shut off") was thus 6 x $648 x 65% = $2,527. Actual tax savings could have been, at best, some fraction of this number. In contrast, had the SPIA premium been left in the SPDA to earn interest, it would likely have earned approximately $2,200 ($39,326 x 5.7%) *in the first year alone.* [13]

Dyer also glosses over another major problem with the SPIA. As the Superintendent observed, "Mr. Dyer's claim that tax savings could somehow make up for the lower yield is inconsistent with his professed rationale that J.V. had no need for tax benefits and should not have had her assets tied up in a tax-deferred investment." (App. 69.) And, indeed, Dyer testified that he felt that J.V. had built up too much tax-deferred gain, putting her heirs at risk of having to pay those deferred taxes at their higher

marginal tax rates. (App. ***35** 102, 151.) But the SPIA did not fix this problem; it exacerbated it. The SPIA was supposed to provide tax benefits to J.V. in 2005 by replacing fully taxable income streams with a mostly non-taxable one. (App. 287-88.) But those fully taxable income streams were fully taxable precisely because they were coming from tax-deferred gain in J.V.'s accounts. (App. 287); see also 26 U.S.C. § 72(e) (providing that non-annuitized withdrawals from annuities are allocated as coming first from any tax-deferred gain). By replacing those income streams with mostly tax-exempt SPIA payments, Dyer substantially reduced - for the next five years - J.V.'s realization of her accrued tax-deferred gain. [14]

Dyer also points to diversification of J.V.'s investments as a rationale for the SPIA transaction. (Blue Br. 29.) But while a need for diversification could be a rationale for moving some of J.V.'s savings from Modern Woodmen to another company, it does not justify putting J.V.'s money in a SPIA, let alone a negative-yielding one. In any event, record evidence does not support Dyer's contention that he was concerned about this issue: Dyer never raised it with J.V. (App. 236) and, further, first attempted to buy the SPIA from Modern Woodmen itself (App. 105-06).

***36** Finally, even assuming *arguendo* that the SPIA could have provided some benefit to a hypothetical consumer in J.V.'s circumstances, it was clearly not appropriate for J.V., who testified that earning a high interest rate was her principal concern. (App. 206.) The SPIA was not consistent with this goal.

3. Competent Evidence Supported the Superintendent's Finding that Old Mutual Never Left a Voicemail with Dyer

In another waived argument, Dyer contends that record evidence does not support the Superintendent's finding that Dyer lied to Old Mutual and the Bureau of Insurance that an Old Mutual representative had, in a voicemail message, admitted error and promised to adjust the SPIA.

The testimony of Russell Laws, the Old Mutual executive, was by itself enough to support the Superintendent's finding of deception. In attempting to minimize Mr. Laws' devastating testimony, Dyer mischaracterizes it. While it is true that, asked whether Old Mutual representatives always logs incoming calls, Mr. Laws answered "[n]ot every time, no," he then refused to agree that this answer also applied to outgoing calls like the alleged voicemail: "Let me be clear, anybody from our service center that makes contacts, their calls would be documented." (App. 180.) Mr. Laws later explains that while he could not say with "metaphysical certainty" that every single call is always logged (id.), such omissions were uncommon and an employee's failure to document such a contact would be a serious matter. (R. 427-28.)

J.V.'s testimony about the voicemail was also more specific and emphatic than Mr. Dyer suggests. Mr. Dyer argues that the only specific testimony J.V. ***37** gave about the voicemail was that she did not remember one way or the other. (Blue Br. 33.) But that ignores the following exchange:
Q. And you said that you couldn't remember if there were any phone messages that [Dyer] played for you, but do you think that if you heard this insurance company say they're going to make up the difference -

A. Oh, yes, I would remember that if they had said it.

(App. 233.) This testimony - which the Superintendent quotes in her findings-is not, as Dyer suggests, a general statement about whether she would remember "if the insurance company did something that was in her interest." [15] (Blue Br. 33.) J.V. is testifying specifically that she would have remembered hearing a voicemail message promising an adjustment to her monthly payment.

Finally, Dyer's claim that it would make "little sense" for him to tell such a lie (Blue Br. 34) does not withstand scrutiny. Dyerhad promised his client - to whom he owed a fiduciary duty - that she would earn a 6% to 7% return on the SPIA. Two years

later, his client figured out on her own that she was getting nowhere near the return Dyer had promised. The State licensing authority was investigating the matter. Dyer had every incentive to paint Old Mutual as the villain.

38** ***4. The Superintendent's Findings and Conclusions Do Not Depend On Whether Dyer Committed Fraud

Dyer argues, again for the first time, that the Superintendent somehow improperly implied that Dyer committed fraud without actually saying so. (Blue Br. 34-35.) But Dyer was not disciplined for committing fraud nor do the sanctions imposed upon him somehow depend upon whether,he committed fraud. He was disciplined for violations of the Insurance Code, including breaching his fiduciary duty to J.V. and demonstrating "incompetence and untrustworthiness" in his dealings with her. (App. 72.) The Decision and Order could hardly be clearer on these points.

5. Competent Evidence Supported the Superintendent's Finding that Dyer Failed to Cooperate With Old Mutual's Investigation

In his final challenge to the Superintendent's findings, also not preserved, Dyer argues that the Superintendent erred by finding he did not cooperate with Old Mutual's investigation. (Blue Br. 35-36.)

Competent - indeed uncontroverted - record evidence supports the Superintendent's finding. Mr. Laws testified that when Old Mutual asked Dyer to explain why he sold the SPIA to J.V., Dyer would not (or could not) do so. (R. 377.) Instead, Dyer provided Old Mutual with a "dump of his documents," which his attorney claimed were "self-explanatory." (Id.) When Old Mutual renewed its request for an actual explanation, Dyer again refused to answer, stating that he "preferred not to deal with [Old Mutual] any longer and would be directing any responses to the Bureau of Insurance." (App. 162.) The Bureau of Insurance, however, also experienced difficulties attempting to ***39** obtain substantive responses from Dyer. (App. 72.) Dyer's undisputed refusal to provide any explanation to Old Mutual of the SPIA's suitability after repeated requests is competent record evidence of a failure to cooperate.

6. The Superintendent Did Not Err in Concluding that Dyer's Refusal to Explain the Rationale for the Transaction to Old Mutual Demonstrated Incompetence and Untrustworthiness

Dyer's claim that his refusal to cooperate with Old Mutual is not a violation of 24-A M.R.S. § 1420-K(1)(H) (Blue Br. 36) is also both waived and without merit. That statute allows the Superintendent to impose discipline on licensees for demonstrating, among other things, "untrustworthiness" or "incompetence." Dyer, aware that the Bureau of Insurance was investigating the SPIA that he had sold to J.V. as Old Mutual's agent, refused twice to explain his rationale for purchasing the SPIA. Dyer knew or should have known that his refusal to explain the transaction to Old Mutual would render it unable to provide a meaningful response to the Bureau's inquiry. Dyer's refusal was also a breach of his producer's agreement with Old Mutual. (R. 380.) It was not error for the Superintendent to conclude that Dyer's refusal to assist Old Mutual in responding to a Bureau investigation, in violation of.his contract, demonstrated untrustworthiness or incompetence.

II THE PENALTIES IMPOSED ON DYER WERE NOT AN ABUSE OF THE SUPERINTENDENT'S DISCRETION

As the lower court correctly concluded, Dyer's conduct - which included deceiving regulators and breaching his fiduciary duty to his client - warranted ***40** significant sanctions. Revocation of his licenses, restitution, and a $5,500 fine were well within the Superintendent's discretion.

A. The Lower Court Correctly Affirmed the Penalties Imposed Upon Dyer

Although Dyer claims that "legal error" affected the hearing officer's decision on remand to re-impose the same penalties after striking the eight violations of 24-A M.R.S. § 2152 (Blue Br. 37), he does not dispute that the re-imposed penalties were still within statutory limits for the remaining violations. See 24-A M.R.S. §§ 12-A, 1420-K(1). What Dyer in reality is arguing is that, absent the § 2152 violations, it was an abuse of discretion for the agency to revoke his licenses.

The lower court did not agree. Even though it accepted Dyer's argument - wrongly, in the Superintendent's view - that the withdrawal of the § 2152 violations was relevant to his overall culpability, the court still concluded that Dyer's conduct was serious enough to warrant revocation of his licenses. This Court should affirm that conclusion.

Whatever the specific statutes violated, it is evident from the Superintendent's factual findings alone that Dyer' conduct was not, as he claims, merely "sloppy and/or careless." (Blue Br. 40.) He was found to have engaged in conduct that included: (1) a misrepresentation to J.V. of the SPIA's interest rate (App. 68) - a matter of utmost importance to her (App. 206); (2) a complete failure to explain to J.V. his four-part plan (App. 67); (3) the purchase of an annuity product so nsuitable that the issuer later removed it from the ***41** market nationwide (App. 69, 185); (4) a failure to review the annuity contract after it was issued (App. 119), (5) deliberate misrepresentations to the Bureau of Insurance and Old Mutual (App. 70); and (6) a refusal to explain to Old Mutual, in violation of his producer's agreement, the rationale for the transaction (Id.). Whether these acts are characterized as "unfair or deceptive" under 24-A M.R.S. § 2152 or demonstrating "incompetence and untrustworthiness" under 24-A M.R.S. § 1420-K(1)(H), they undoubtedly constitute "serious violations of the Insurance Code." (App. 72.) The hearing officer on remand could have reasonably concluded based on the by-then undisputed facts that Dyer posed a threat to insurance consumers and that revocation of his licenses was necessary to protect the public.

Certainly the Superior Court recognized the seriousness of Dyer's conduct. The court found it particularly significant that Dyer lied to the Bureau of Insurance, noting that "[w]hen the lie goes to the essence of the issue and is repeated to investigators, it has to be considered among the most serious of possible violations of the insurance law." (App. 33.) The court also highlighted the fiduciary duty Dyer owed to J.V. as her consultant and the fact that license revocation is not necessarily permanent. (App. 34.) The lower court's persuasive reasoning on these points should be affirmed.

In claiming his conduct was merely "sloppy and/or careless" Dyer mischaracterizes the record. Dyer asserts that he had no motive to take advantage of J.V. because his "potential commission" from her was only $1,500. (Blue Br. 40.) But $1,500 was his maximum consulting fee; there was ***42** no limit on his commissions once the consulting fee was fully offset. Had Dyer been able to follow through on his plan to buy additional annuities with the remaining $100,000 in J.V.'s SPDA (App. 110), he would have easily offset the remaining $124 in consulting fees and earned a substantial profit over and above $1,500. Indeed, Dyer himself estimated that he would have earned $8,000-$9,000 in commissions had he used the entire balance of the SPDA to purchase new annuities. (App. 110).

Dyer also tries to establish abuse of discretion by comparing his case to other cases involving insurance licensees. (*See* Appellant's Supplement of Legal Authorities ("Supp.").) But this Court ruled in *Hall v. Board of Environmental Protection*, 498 A.2d 260 (Me. 1985), that a Rule 80C petitioner cannot establish abuse of discretion by citing instances of supposedly disparate treatment. Id. at 266. In Hall, the denied permit applicants submitted a supplemental record of 14 permit applications in an attempt to show that the agency had "applied an entirely different standard to their application." *Id.* In declining to even examine the other applications, the Court explained that "[t]o examine each application would take us, as a reviewing court, far beyond our well-established role of reviewing the administrative record for substantial evidence to support the agency's findings." *Id.* Hall is dispositive of Mr. Dyer's attempt to rely on other Bureau decisions.

In any event, Dyer's comparisons are inapt. Every single agency adjudication cited by Dyer - *Hancock, Stiles, Richard, Black, Juliano, Watts, St. Hilaire, Gagnon,* and *Walls* - resulted in the revocation of the respondent's ***43** license. (See Supp. at tabs 1, 3, 4, 6, 12, 14, 15.) Even if Dyer were correct that the conduct in those cases was more serious, it does not follow that Dyer's conduct was not serious enough to warrant revocation.

The only three cases cited by Dyer in which licensees were given penalties short of revocation (*McNally*, *Witham*, and *Harris*) are not proper comparisons because they were each resolved by consent agreement, not adjudicatory hearing. (*See* Supp. at tabs 5, 8, 86 16.) A consent agreement is a negotiated document that often reflects tradeoffs regarding the facts admitted, the violations found, and the penalties imposed. Comparatively light consented-to penalties could reflect any number of factors other than culpability, including, as the lower court recognized, "the strength of the evidence against those producers." (App. 33.) Dyer's comparison is akin to a criminal defendant relying on plea agreements to argue that his sentence after trial was too harsh.

In any event, Dyer's comparisons are based on the incorrect notion that his wrongful conduct was limited to sloppiness or carelessness. In fact, as already discussed, his conduct was grossly incompetent, demonstrated untrustworthiness, and was, in some cases, outright dishonest. His conduct is thus more comparable to the conduct at issue in Richard (Supp. at tab 10) (revoking license and imposing $12,500 civil penalty against insurance producer that engaged in various dishonest and untrustworthy acts relating to the sale of annuities to a single customer) than cases involving garden-variety mistakes or incompetence.

***44** As the Superior Court recognized, prior decisions reflect that licensees who fail to cooperate or lie during Bureau investigations typically lose their licenses as a result. (App. 33 (citing *Costa*, *Lillibridge*, and *Merritt* (Supp. at tabs 2, 7 & 9)).) Dyer's conduct falls within this category. Similarly, producers who persuade vulnerable consumers to engage in inappropriate financial transactions also tend to lose their licensees, even if only a single consumer is mistreated. *See Richard* (Supp. at tab 10) (inappropriate transactions involving terminally ill client); *Juliano* (Supp. at tab 6) (inappropriate transactions involving "vulnerable senior citizen") *affd Bankers Life & Cas. Co. v. Superintendent of Ins.*, 2012 WL 1521472 (Me. Super. Feb. 21, 2012). Dyer's conduct - involving a senior citizen with limited education and only rudimentary knowledge of financial planning - also falls within this category.

B. The Withdrawal of the § 2152 Violations Did Not Materially Lessen Dyer's Culpability

In affirming the revocation of Dyer's licenses, the lower court opined that, contrary to the hearing officer's view, the withdrawal of the § 2152 violations on remand was "relevant" to Dyer's culpability. (App. 29.) In his brief Dyer attempts to widen this crack into a chasm, arguing that the withdrawal of the § 2152 violations "fundamentally changes the nature and character of Dyer's conduct for purposes of determining what penalty to impose." (Blue Br. 37.)

Neither the Superintendent's original decision nor the nature of § 2152 itself support the notion that striking the eight § 2152 violations - thus reducing the total number of statutory violations to 21 - was somehow a game- ***45** changer. These violations add little to the assessment of Dyer's conduct and were clearly peripheral to the Superintendent's actual reasoning. Their withdrawal on remand did not materially change Dyer's culpability.

First, the Superintendent's decision makes clear that the § 2152 violations were not the basis for her decision to revoke Dyer'S license and impose civil penalties and restitution. The Superintendent described Dyer'S culpability in terms of 11 illegal acts, not 30 violations of the Insurance Code. (App. 73.) The Superintendent fined Dyer on a per-act, not a per-violation basis. (App. 72.) The amount of each fine, therefore, was the same whether or not § 2152 was listed among the Code provisions that the act violated. (*Id.*) The Superintendent wrote not a word about the § 2152 violations in her explanation of why she revoked Dyer's license. Rather, she described Dyer's conduct as demonstrating "incompetence and untrustworthiness" (App. 72) - the standard set forth in 24-A M.R.S. § 1420-K(1)(H), which even Dyer does not claim (with one minor exception, *see* Part I.D.6, *supra*) to be inapplicable to the facts as found. (Id.) The hearing officer on remand was therefore justified in concluding that § 2152 did not play a material role in the Superintendent's initial determination of sanctions.

Second, Dyer vastly overstates the significance of § 2152 as compared to the other Insurance Code provisions he was found to have violated. Dyer argues that a violation of § 2152 "implies a level [of] dishonesty and/or maliciousness that is not present

in merely incompetent or untrustworthy ***46** conduct." (Blue Br. 38.) But Dyer is reading a mens rea element into § 2152 that does not actually exist.

The statute, which is part of a chapter the Insurance Code titled "Trade Practices and Frauds," provides in relevant part:

> No person shall engage in this State in any trade practice which is defined in this chapter, as, or determined pursuant to this chapter, to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

24-A M.R.S. § 2152. By its plain words, no particular mental state is required to violate the statute. The words "unfair" and "deceptive" describe the prohibited "trade practice," not the mental state of the perpetrator.

Confirming this interpretation, nearly all of the specific trade practices "defined in this chapter... to be... an unfair or deceptive.act or practice" are strict liability offenses. Section 2152-B defines failure to conspicuously disclose certain information in marketing materials as an "unfair trade practice." Section 2162-A defines the conditioning payment of a policy dividend upon renewal of an insurance contract as an "unfair trade practice." In the rare instance that a practice does require a certain mental state, the relevant provision explicitly says so. See, e.g., 24-A M.R.S. § 2164-D(2)(A) (requiring "conscious disregard" of the law). These provisions make clear that when the Legislature speaks generically of an "unfair or deceptive" practice in the Insurance Code, it is speaking about the effect of the practice on the consumer, not the degree of malice with which the practice is carried out.

***47** Reading § 2152 in this way is consistent with the overall purpose of insurance regulation, which is to protect consumers; if the agency were required to prove a particular mental state to establish a violation, this protective purpose would be undermined. This conclusion is also consistent with this Court's interpretation of the almost identically worded Maine Unfair Trade Practices Act, 5 *M.R.S. § 207, under which "[a]n act may be unfair or deceptive even when unknowingly perpetrated." Binette v. Dyer Library Ass'n,* 688 A.2d 898, 906 (Me. 1996).

Since an act that violates § 2152 does not require any particular culpable mental state, the Superintendent's inclusion of these violations in the original decision did not imply findings about Dyer's mental state beyond what she expressly stated in her findings of fact. If the Superintendent's initial revocation of Dyer's licenses was not an abuse of discretion on the facts as found - and Dyer never claimed that it was - then the hearing officer's re-imposition of that penalty on remand could not have been an abuse of discretion either.

C. Dyer's Unpreserved Contention that the Evidence in the Whole Record Does Not Support the Penalty of Revocation Simply Reprises His Other Flawed Arguments

Finally, Dyer argues that the "whole record reveals that the penalty imposed on Dyer is disproportionately harsh compared to the alleged harm." (Blue Br. 45.) This is yet another argument that Dyer failed to preserve by never raising in the lower court.

***48** In any event, Dyer's contention largely amounts to rehashing arguments from earlier in his brief: questioning J.V.'s credibility; claiming the negative-yield SPIA really was beneficial to J.V.; and noting that his misconduct was limited to one victim. (Blue Br. 45-46.) For reasons already discussed, these contentions are without merit.

The only new contention that Dyer briefly touches on (cross-referencing a non-existent "Section I(F)" of his brief) is that the Superintendent improperly excluded two pieces of evidence: (a) testimony from a proffered polygraph expert and (b) a one-page affidavit by J.V.'s granddaughter submitted more than a month after the hearing. (Blue Br. 47.) It is unclear how the Superintendent's evidentiary rulings, whether correct or not, could illuminate whether the sanctions she imposed were

"disproportionately harsh." (Blue Br. 45.) In any event, as the lower court affirmed (App. 19-21), both of these evidentiary determinations were correct.

With regard to polygraph evidence, this Court's most recent statement on the subject is unequivocal that such evidence is not just inadmissible but entirely worthless: "We have a long-standing, fundamental concern regarding polygraph machines due to their non-existent value when it comes to determining credibility." *State v. Lavoie*, 2010 ME 76, ¶14, 1 A.3d 408. The Superintendent properly relied on Lavoie (R. 605) to exclude the testimony.

The Superintendent also properly excluded a brief, vague affidavit by J.V.'s granddaughter, which was submitted after hearing and without any attempt to show good cause, as is required for admission of sworn written ***49** testimony. 5 M.R.S. § 9057(5). The Superintendent properly concluded that it would be unfair to admit the affidavit since Bureau Staff had no opportunity to cross-examine the witness. (R. 183.)

Conclusion

For the foregoing reasons, the Superior Court's decision affirming the decisions of the agency should be affirmed.

Footnotes

1 Producer is the Insurance Code's collective term for the insurance professionals commonly known as agents and brokers. See 24-A M.R.S. § 1420-A(4).

2 For life and health insurance and annuities, it is permissible to act as a consultant and producer on the same transaction under 24-A M.R.S. § 1466(2), but only with the written agreement of the client and only if it is the consultant's good faith opinion under 24-A M.R.S. § 1467 that the transaction best serves the client's needs and interests.

3 Old Mutual made the last 30 payments at the new rate (R. 883), which adds up to a total payout of $39,326.40-10 cents less than the premium paid.

4 The Superintendent took official notice of the other enforcement proceeding. (R. 557.) The decision imposing the license suspension is available at http://www.maine.gov/pfr/insurance/orders/08-215amended.htm.

5 Although $500 is the maximum fine available under 24-A M.R.S. § 12-A, penalties of up to $1,500 per violation could have been imposed under 10 M.R.S. § 8003(5), as they were in the Richard case. (See Appellant's Supplement of Legal Authorities at tab 10.)

6 Dyer may attempt to argue that he preserved his challenges to some of these findings by criticizing them as part of his argument to the lower court that the Superintendent was biased against him. But Dyer has abandoned that argument. His only claim here is that the findings are not supported by substantial evidence, an argument he did not make below with respect to these findings.

7 *Accord Ellery v. Dep't of Labor Unemployment Ins. Commin*, 1999 ME 194, ¶ 13, 742 A.2d 928 ("we refrain from assessing credibility because credibility is within the province of the fact finder"); *Merrow v. Me. Unemployment Ins. Comm'n*, 495 A.2d 1197, 1201 (Me. 1985) ("It is not our function... in reviewing an administrative decision, to undertake a fresh determination of credibility."); see Anderson v. Me. Employees Ret. Sys., 2009 ME 134, ¶ 27, 985 A.2d 501 (holding lower court reviewing agency decision erred by making a credibility determination).

8 It was this question that prompted J.V. to make the quip about remembering her name, which reads in whole:
Are you kidding? I mean, give me a break. I have a hard time to remember my own. No I don't remember. He was out of Lewiston.
(App. 217.) It is absurd to read this passage, as Dyer does (Blue Br. 23), as an admission of cognitive impairment. If anything, it is an admission of exasperation with the questioning. Similarly, although Dyer points to it in his brief (Blue Br. 11), when J.V. said "I must be senie. Don't tell anybody" she was obviously not serious. (App. 226-27.)

9 See Kaiser Family Foundation, Kaiser Health Tracking Poll, at 5 (May 2011) (finding 21% of the, public misidentifies the Medicare program as "Medicaid"), http://www.kff.org/kaiserpolls/upload/8190-F.pdf.

10 While it is true that J.V. did gift some money to her granddaughter in 2005, J.V.'s testimony makes clear that this was in response to a family emergency, and was not reflective of her overall intentions for her estate. (App. 227-28.)

11 What is more, in purchasing the SPIA, Dyer specified the monthly payment he wanted, leaving the issuer to calculate the upfront premium necessary to generate that payment. (App. 109.) Strictly speaking, the problem with the SPIA's yield was not that the $648 per month payment was too low by tens of dollars; it was that the $39,326 premium was too high by thousands of dollars.

12 Dyer's claim that he intended to offset income loss from the SPIA by reinvesting the remainder of J.V.'s SPDA in annuities earning "six, seven, eight percent guaranteed interest" (App. 116) is directly contrary to what he told the Bureau in his complaint: "[w]hen 1 originally sold this contract, we were in a low interest rate environment, and the true benefit for my estate and tax plan was to utilize an exclusion ratio." (R. 639.)

13 If J.V.'s $550 monthly withdrawals from the SPDA are assumed to have continued, this first-year yield would drop slightly, although not materially. The withdrawals would more significantly affect the interest calculation for later years.

14 The obvious way to achieve the dual goals of reducing taxable income in 2005 and reducing accrued tax deferral in future years was for J.V. to simply reduce her withdrawals from tax-deferred accounts in 2005 and rely on her post-tax savings to cover the shortfall. Dyer testified that he considered funding the SPIA entirely with post-tax dollars from J.V.'s bank account (App. 150), confirming that J.V. already had available the $2,527 in post-tax dollars that the SPIA provided her in 2005. Any post-tax savings used up in 2005 could have been replenished through increased withdrawals from her tax-deferred savings in later years. Dyer, however, would have received no commission from this strategy, since it would not have required buying a new annuity.

15 J.V. was also asked if she would remember generally if the insurance company had taken some action to her benefit, to which she ultimately replied "Oh, yes, definitely." (App. 234.) It is not accurate that J.V. was asked this question twice and gave a different answer each time. (Blue Br. 11.). J.V. cut off the Superintendent mid-question to provide the supposedly conflicting answer. The Superintendent immediately clarified what she was asking and J.V. then gave the answer above. (App. 233-34.)

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